No. 88-1719

Supreme Court, U.S.
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In the

Supreme Court of the United States
OCTOBER TERM, 1989

CHAUFFEURS, TEAMSTERS AND HELPERS LOCAL NO. 391,

Petitioner,

v.

THOMAS C. TERRY, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF FOR TEAMSTERS FOR A DEMOCRATIC UNION AS *AMICUS CURIAE* URGING AFFIRMANCE

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QUESTION PRESENTED

Are employees entitled to a jury trial in a "hybrid" action in which they sue for redress for their employer's breach of contract and for their union's failure to provide them with fair representation in presenting their claim of breach of contract, particularly when the forum that consists of an equal number of union and employer representatives?

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BRIEF FOR TEAMSTERS FOR A DEMOCRATIC UNION AS *AMICUS CURIAE* URGING AFFIRMANCE

INTEREST OF *AMICUS CURIAE*

Amicus curiae Teamsters for a Democratic Union ("TDU") is a voluntary, unincorporated association of thousands of rank-and-file members of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, who seek to reform and democratize their union, and in so doing, to make it more responsive to their needs. One of the perils of supporting reform within the Teamsters union, of which petitioner is a local, is that it often leads to economic reprisals by employers. Not surprisingly, the union leadership often fails to provide fair representation when employers fire reformers or otherwise subject them to adverse treatment on the job. The duty of fair representation ("DFR") and the right to sue the employer in a "hybrid" action for breach of the collective bargaining agreement, provided that the employee can prove that

the union has breached its DFR, are key components of the legal protection on which TDU members depend to safeguard their right to seek to improve their own union.

Most TDU members are covered by collective bargaining agreements similar to the one at issue in this case, which provides for submission of their grievances to groups, known as joint committees, that are comprised of equal numbers of union and employer representatives. TDU believes that the ability of union members to have their claims tried to a jury of their peers is crucial in sustaining the DFR as a meaningful "bulwark to prevent arbitrary [Teamster] union conduct against individuals stripped of traditional forms of redress by the provisions of federal labor policy." *Vaca v. Sipes*, 386 U.S. 171, 182 (1967). Therefore, it files this brief, with the written consent of the parties, to comment on the special need of Teamsters for the right to trial by jury in cases where joint committees are used to dispose of their contract claims.

ARGUMENT

Introduction

If the plaintiffs in this case had been suing for redress of a breach of an employment contract, or had been suing their union for tortiously interfering with or mishandling their contractual claims vis-a-vis an employer, there would be little doubt that it would be the sort of legal action that has traditionally been tried to juries, and that is covered by the constitutional right to a jury trial. Until this Court's decisions in *UPS v. Mitchell*, 451 U.S. 56 (1981), and *DelCostello v. Teamsters*, 462 U.S. 151 (1983), there was a consensus among the courts of appeals that, at least when employees are seeking back pay remedies, there is a right to a jury trial in "hybrid" actions to enforce the duty of fair representation against unions, and to enforce collective bargaining agreements against employers. *Cox v. H. Masland & Sons*, 607 F.2d 138 (5th Cir. 1979); *Minnis v. UAW*, 531 F.2d 850 (8th Cir. 1975). And, although one appellate court has understood *Mitchell*'s and *DelCostello*'s treatment of the analogy between the hybrid action and various state

causes of action as requiring rejection of the right to jury trial in such cases, *Leach v. Pan American World Airways*, 842 F.2d 285 (11th Cir. 1988), the bulk of the post-*DelCostello* appellate authority continues to support the right to a jury trial. *UTU Local 74 v. Conrail*, 881 F.2d 282 (6th Cir. 1989); *Terry v. Teamsters Local 391*, 863 F.2d 334 (4th Cir. 1988); *Quinn v. DiGiulian*, 739 F.2d 637, 646 (D.C. Cir. 1984); *Roscello v. Southwest Airlines*, 726 F.2d 217, 220 (5th Cir. 1984).

In this Court, the parties have focused on the question whether there is a right to a jury trial in the portion of the hybrid action that is filed against the union for breach of its DFR. This focus is quite natural, inasmuch as the breach of contract suit against respondents' employer, McLean Trucking Co., was derailed by McLean's bankruptcy. We are in general agreement with the argument of respondents that DFR claims against unions generally, as well as the particular claim that respondents are pursuing in this case, are protected by the Seventh Amendment's right to a jury trial. We do, however, note our agreement with the caution expressed by the D.C. Circuit in *Quinn v. DiGiulian*, 739 F.2d 637, 646-647 (1984), that district courts should be cognizant of "the danger that jury prejudice against unions . . . will infect the verdict and inflate damage awards," and consequently should be careful to guide the jury accordingly in that phase of the litigation.

In this brief, we focus instead on the aspect of petitioner's argument that relies on the assertion that the claim against the employer is an attempt to overturn an arbitration award as an important reason to treat the related claim against the union as a non-juryable equitable action, Pet. Br. 20-22, a view which petitioner's *amici* strongly second. National Railway Labor Conference Brief 7-15; Chamber of Commerce Br. 16-20. Respondents' principal answers to this contention are that they do not seek to overturn an arbitration but to obtain damages for what they lost from the underlying breach of contract, and that *Ross v. Bernhard*, 396 U.S. 531, 539-540 (1970), a case ignored by petitioner, holds that the fact that the underlying action comes before the court by virtue of a device that was once deemed equitable, does not bear on the right to a jury trial. Although

we agree with these responses, we think it unnecessary to rely on them, for two reasons that are explained in the pages that follow. In Section A of the brief we argue the contractual claim in this case was not arbitrated. To the contrary, it has been decided by a process of negotiation that does not have any of the qualities of an arbitration. Next, Section B of the brief shows that, because hybrid cases following the arbitration of a grievance constitute such a small part of the universe of all hybrid cases, it makes little sense to adopt a rule barring jury trials in all cases by virtue of an argument that, even if valid, would apply only to a few situations.

A. Because Joint Committees Decisions Are Not the Equivalent of Arbitration Awards, Cases Brought Contesting the Union's Conduct in a Joint Committee Proceeding Do Not Seek to Set Aside an Arbitration Award.

Petitioner and its *amici* have used the language of arbitration in discussing what happened in this case, but in fact the decision-making body that ruled on respondents' claims bore little resemblance to impartial arbitration, either before a single neutral arbitrator or before an arbitration panel headed by a third, neutral party. In fact, a joint committee decision rejecting an employee's claim is no more, and no less, than a decision by a Teamster member's own leadership to abandon his grievance at an early step in the grievance process, short of the type of arbitration contemplated by arbitration statutes. In order to understand this proposition, we examine the structure and operation of the Teamster joint committee and compare it to the more traditional grievance-arbitration process employed by other unions to resolve disputes arising under collective bargaining agreements.

In most unions, a worker who believes that his rights under the collective bargaining agreement have been violated consults a union representative who advises the member whether or not there is a viable claim to be made under the agreement. In some contracts, the very filing of a grievance form requires the approval of a union representative, such as a steward or business agent; in others, the

member is entitled to file a grievance on his own. In either case, the union then assumes responsibility for discussing the grievance with the employer who can grant or deny the relief requested. If the grievance is denied, then a union representative with greater authority decides whether to take the grievance up with higher management representatives, again with the possibility of denying, granting, or compromising the grievance. The grievance proceeds through this process until, finally, the grievance is discussed at the highest levels available under the grievance procedure (for example, between the local union president or grievance committee and the plant manager, or, in a multi-plant company with a national contract, between the representatives of an international union and the corporation's national labor relations staff).

At each "step" of the grievance procedure, both the union and the company have the power under the contract to concur in the position of the other. The company could decide to grant the grievance, the union could decide to abandon the grievance, or the two sides could settle the grievance by agreeing to a compromise. If the parties reach an agreement, the decision becomes final and binding under the contract, and cannot be set aside unless it is determined in a lawsuit such as this that the union has breached its duty of fair representation in declining to seek any relief, or in accepting less than complete relief, by not taking the grievance to the next higher step (or to arbitration). But if the two sides find themselves in disagreement at any step, and neither side is willing to yield, the grievance proceeds to the next step of the procedure, until ultimately the union invokes impartial arbitration.

The same sort of process takes place under the Teamsters' national contracts, but the succession of meetings between union and company representatives who meet to consider grievances and decide whether and how to settle them are decribed by the parties as "joint grievance committees." So, for example, under the National Master Freight Agreement at issue here, the first meeting will be between representatives of the local union and the employer at the local level. Article 44, Section 1. If these representatives cannot settle the grievance, because neither side is willing to com-

promise or abandon its position, the grievance is next considered by a joint committee for the states of North and South Carolina. This committee consists of an equal number of union and employer representatives, Article 43, Section 1, who may "settle" a grievance by majority vote. Assuming no settlement at this level, the grievance may then proceed to the Eastern Conference Joint Area Committee, Article 43, Section 2, and the National Grievance Committee, Article 43, Section 7. If the joint committees deadlock all the way to the top of the grievance procedure, the parties are entitled to use economic self-help (*i.e.*, a strike or lockout) to win the grievance.

Each committee consists of an equal number of union and employer representatives, with no neutrals or tie breakers. A majority vote is required in order to "decide" a grievance. Therefore, whenever a employee's grievance is "granted" by a joint committee, one or more of the company representatives must have voted to sustain the union's position; similarly, when a committee "denies" a grievance, one or more union representatives voted to sustain the employer conduct which precipitated the grievance. Thus, as Professor David Feller has observed, "A decision by a joint committee that a grievance lacks merit . . . is thus simply an agreement by the union that management did not violate the agreement." Feller, *A General Theory of the Collective Bargaining Agreement*, 61 Calif. L. Rev. 663, 837 (1971). *Accord*, *Humphrey v. Moore*, 375 U.S. 335, 352 (1964) (Justice Goldberg, concurring) (decision of Teamster joint committee is tantamount to "mutually acceptable grievance settlement between an employer and a union)."

The joint committee procedure also differs from the traditional union procedure in that, under some of the Teamster agreements (including the freight agreement at issue here), there is no mandatory arbitration at the end of the process. Rather, if there is a deadlock at the National Grievance Committee, each side is entitled to use economic recourse — *i.e.*, the union is free to strike — in order to obtain its objectives. In the alternative, the contract recognizes that the parties may refer the grievance to "an impartial arbitrator," but that, too, must be done by majority vote, Article 44, Sections 1(c) and 1(d), *see also* Article 8, Section 1, and so cannot be accomplished without the consent of both sides.

There is another reason why the assumption underlying petitioner's argument here — that grievance committees are simply another form of arbitration — is seriously misplaced. The joint committee system was originally formed by Farrell Dobbs, an early Teamster leader in the trucking industry, precisely because he distrusted arbitrators based on his view that their interests would inevitably be aligned with capital and against the working class. Rather than giving the right to decide the meaning of contracts (and thus, potentially, to eviscerate their protections) to arbitrators, Dobbs preferred to be able to wield the strike threat to maintain the contractual benefits that he had won at the bargaining table. James & James, *Hoffa and the Teamsters* 168 (1965). Jimmy Hoffa expanded the joint committee system to the entire trucking industry, although he did not share Dobbs' ideological bent. Instead, Hoffa used the joint committees not only to keep contractual application out of the hands of arbitrators, but also to maximize the leverage that he could bring to bear on operators, local union officials, or insurgents who contested his control. *Id.* at 31-33, 135, 167-185, 202.[1]

Another major difference between grievance procedures that conclude with an arbitration and the joint committee process is that Teamster officials do not exercise the screening function that officials of other unions do in deciding which cases should be taken to the joint committee. If every grievance culminated in a hearing before an arbitrator, the parties would be swamped in arbitrations. Thus, in *Vaca v. Sipes*, 386 U.S. 171, 191-192 (1967), this Court

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[1]Control over the grievance procedure translates into control over the leaders of subordinate bodies for the simple reason that a local leader recognizes that he cannot serve his constituents by winning grievances (and thus cannot expect to be reelected) unless he has the support of the members of the Teamster hierarchy who appoint the union representatives who sit on the grievance committees. *See* PROD, *Teamster Democracy and Financial Responsibility: A Factual and Structural Analysis* 26-28 (1976).

indicated that one of the reasons why it would impose liability on union officials only if their failure to take a case to arbitration was arbitrary, perfunctory, or discriminatory was that a stricter standard would encourage unions to arbitrate meritless grievances.

In the Teamsters union, however, this sifting does not occur among union officials before arbitration, but rather during the deliberations of the joint committees in which union officials participate along with their coequals representing the employers. Although elected local union officials may attempt to persuade a grievant to accept a compromise, absent the consent of the grievant practically every grievance is submitted to a joint committee. Then, grievances with little or no merit are compromised or abandoned by the union officials who sit on the joint committees; some meritorious grievances, particularly those filed by union insurgents, are also summarily dropped. And the harder and more important cases are passed up the union hierarchy to the regional and national committees.

The reason why joint committees are able to do the sifting that most other unions do before arbitration is that the committees use very different procedures from those used in true arbitration. In arbitration, the two sides normally present witnesses and documents, and cross-examine each other's witnesses. According to the most recent Annual Report of the Federal Mediation and Conciliation Service, the average labor arbitration hearing lasts one day, and on average the arbitrator spends another two days studying the briefs and preparing a decision. ***40th Annual Report, FY 1987***, page 21. By contrast, a panel of the joint committee typically hears between 15 and 30 grievances in a single day, with each grievance consisting of brief oral presentations by officials of the company and the local union, along with the submission of some documents and perhaps written statements by witnesses, but there is no "testimony." The joint committee actually decides the cases in executive session on the day that they are heard, and immediate rulings are issued without any explanation beyond "denied," "granted," or "deadlocked." On average, a panel spends fifteen minutes hearing from the two sides and five minutes deciding the

grievance. Summers, *Teamster Joint Grievance Committees: Grievance Disposal Without Adjudication*, Proceedings, 37th Annual Meeting, National Academy of Arbitrators 134-138 (1984).

Yet another difference between arbitration and the joint committee process is their attitude toward *ex parte* communications. The rules of arbitration strictly forbid *ex parte* contacts between the parties and the arbitrators, Rule 45, Labor Arbitration Rules, American Arbitration Association, but such contacts between interested union and employer officials and their counterparts on the joint committees are not only proper, but the "expected norm." *E.g.*, Azoff, *Joint Committees as an Alternative Form of Arbitration Under the NLRA*, 47 Tul. L. Rev. 325, 360-361 (1973). Indeed, before the joint committees meet, the two sides commonly conduct their own screening sessions among both the advocates and the joint committee members on that side. Each side uses such sessions to discuss the cases that are about to be heard, determine which cases are the most important, and consider the best way to present the important cases in order to persuade the other side to concur in a particular settlement of those grievances. Summers, *Grievance Disposal Without Adjudication*, *supra*, at 138-139.[2]

As the title of Professor Summers' essay suggests, another difference between arbitration and the joint committee system is that, although an arbitrator adjudicates each individual case on its own merits, the joint committees resolve grievances by the job lot and necessarily become involved in disposing of grievances that are deemed less important in order to obtain concessions on the more important grievances. Both sides know that, if they rigidly refuse to vote for the other side on every grievance, every case will be deadlocked and there will be numerous strikes. Thus, the parties

[2]Indeed, the local union officials who act as "advocates" in one case will sit as members of the joint committee in other cases during the same two or three day session of the joint committee, thus heightening the political atmosphere of the process and making the horsetrading of grievances inevitable. *Id.*

are strongly encouraged to engage in the horsetrading of grievances. In the words of Elliot Azoff, a Teamster lawyer who defended the joint committee system as a means of resolving labor disputes, "the joint committee is structured so as to insure maximization and exploitation of opportunities for wheeling and dealing. . . . [Although these problems] are common to all union grievance machinery, [t]he difficulties . . . are accentuated in the committee system . . .." 47 Tul. L. Rev. at 328-329.

Azoff nonetheless praised the committees for their ability, in effect, to amend the collectively bargaining agreement as necessary to carry out the wishes of the parties about how a particular collective bargaining dispute ought to be resolved, regardless of what the parties may have intended when the contract was negotiated in the first place: "While an arbitrator would be bound to apply the existing contract, [*see Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960)], no similar limitation would restrict the actions of the joint committee that could modify, amend or supplement the original agreement." 47 Tul. L. Rev. at 348. This difference was recognized by Justice Goldberg in his concurring opinion in *Humphrey v. Moore*, 375 U.S. 335, 353 (1964), where he distinguished the powers of an arbitrator under most labor contracts, from the power of the union and the employer, operating through the mechanism of the joint committee, to amend the contract if it suits their needs.

To recognize the difference between joint committees and arbitration is not to deny Teamster employers the ability to agree with their unions that joint committees shall be the mechanism for achieving final and binding resolution adjustment of grievance disputes between them, just as the resolution of a grievance through the grievance and arbitration procedure is final and binding. *General Drivers v. Riss & Co.*, 376 U.S. 517 (1963) (result binds union and employer); *Humphrey v. Moore*, 375 U.S. 335 (1964) (result binds employees). Nor does recognition of the difference necessarily bear on the standard that should be applied to decide whether there has been a breach of the duty of fair representation; that question is

not presented here, and therefore should be decided another day.[3]

This explication of the marked differences between the arbitration process and the Teamster joint committees is simply directed to petitioner's argument that there is no right to a jury trial because respondents here are supposedly challenging an arbitration award, and that their claims are thus said to be akin to state-law actions to vacate an arbitration that have traditionally been considered equitable and hence non-juryable. Petitioner's argument is without foundation because, inasmuch as respondents' grievance was rejected by a joint committee, they are not seeking to overturn the equivalent of an arbitration decision, but a decision to abandon a grievance short of arbitration. Accordingly, the cases that provide for bench trials in suits to overturn a full-blown, neutral arbitration have no bearing here. Rather, in these circumstances the action against both the employer and the union is properly characterized as legal, and respondents were entitled to a trial by jury.

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[3]In that regard, a joint committee's decision to drop or compromise a grievance is "final and binding," much as the results of another union's grievance procedure would be. However, it should be recognized that a joint committee decision to deny a grievance necessarily represents the union's decision to drop that grievance, much as another union's decision not to arbitrate would be. Dropping or compromising grievances is not inherently unlawful; compromise is, after all, the essence of negotiation. But, in TDU's view, the decision of the union, acting through the joint committee, to drop the grievance should be examined through the prism of the duty of fair representation, rather than focusing exclusively on the performance of the union "advocate" before the grievance committee. Otherwise, the ability of the union to mask its rejection of the grievance behind a joint committee, whose reasons are never given, effectively places this Court's "bulwark to prevent arbitrary union conduct," *Vaca v. Sipes*, 386 U.S. 171, 182 (1967), out of the reach of most Teamsters.

Although *UPS v. Mitchell*, 451 U.S. 56 (1981), which held that part of a hybrid action that seeks redress for the employer's breach of contract should be governed by state statutes of limitations that apply to actions under state law to vacate an arbitration award, involved a joint committee, no argument was made there to distinguish joint committees from true arbitration.

B. Jury Trials Should Be Generally Available in Hybrid Cases.

TDU's argument leads initially to affirming the decision below, upholding a jury trial in this case and rejecting the analogy to suits to vacate an arbitration award, because the joint committee here is not the equivalent of arbitration. If the Court were to declare that the presence of an arbitral award made a difference with respect to the right to a jury trial, it would in effect be lead to different treatment within the class of hybrid actions, allowing jury trials in cases not involving arbitration, but withholding the right to a jury trial in postarbitration cases. However, as the Court decided in *DelCostello v. Teamsters*, 462 U.S. 151, 166 n.16 (1983), it should avoid "knotty problems of categorization and consistency" that would be raised by providing different procedures for different kinds of hybrid cases.[4]

On the question of deciding *which* unitary rule to adopt, the Court should note that cases alleging union misconduct during an arbitration proceeding are a small minority of all hybrid cases. More than three-quarters of all hybrid actions are brought, not to set aside the decision of an arbitrator, but rather because the union has refused

[4]If the Court does decide to have a split rule, that could tend to lessen the Teamster union's incentive to use the joint committee system. Such a result, however, might be desirable for its own sake. Almost one-third of all duty of fair representation cases are brought by Teamsters, a fraction that is far out of proportion to the Teamsters' 10% share of the private-sector unionized workforce. Goldberg, *The Duty of Fair Representation: What the Courts Do in Fact*, 34 Buff. L. Rev. 89, 123-124 (1985). And, as noted below, 56% of the cases brought to challenge union misconduct in "arbitration" are involved the joint committees. *See infra* in text. *See also* Remarks of Robert Coulson, President of the American Arbitration Association, 107 LRR 147 (June 2, 1981): "The joint grievance committee system of arbitration found in Teamster contracts is so clearly defective as an impartial mechanism that it is not surprising that we keep seeing it tested in the courts." Thus, even if the granting of a right to a jury trial in joint committee cases had the indirect effect of encouraging the Teamsters union to move in the direction of bona fide arbitration, the final result might well be more finality and fewer DFR cases, which is certainly a result to be desired.

to take a worker's grievance to arbitration in the first place. Goldberg, *The Duty of Fair Representation: What the Courts Do in Fact*, 34 Buff. L. Rev. 89, 129 (1985) (data based on samples of courthouse files and published opinions). The Goldberg study included joint committee cases among one-quarter of all cases filed after an arbitration, but, as the study shows, 56% of the cases alleging union misconduct during an "arbitration" involved the joint union-management committees. *Id.* at 128.[5] Thus, if the Court agrees that cases alleging union conduct during a joint committee proceeding are not the equivalent of suits to set aside an abirtration award, only a tiny fraction of all hybrid cases — 44% of 25%, or barely more than 10% — are brought to set aside arbitration awards. Thus, the presence of an arbitration award should not dictate whether there is a right to a jury trial in hybrid cases, because that would truly allow the tail to wag the dog.

CONCLUSION

The judgment of the court of appeals should be affirmed.

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[5]This figure is derived by multiplying the fraction of postarbitration cases involving the Teamsters (66.2%) by the fraction of those cases that involved the joint committee (84.9%). *Id.* at 128.